IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

MARTHA H. OLIN, AS ADMINISTRATRIX OF THE ESTATE OF WALTER G. OLIN, DECEASED, *Petitioner and Appellant below,* *vs.* NEW ENGLAND LIFE INSURANCE COMPANY OF BOSTON, MASS., *Respondent and Appellee below.*	No.....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

THE OPINION OF THE COURTS BELOW

No written opinion was filed by the District Court.

The opinion of the Circuit Court of Appeals for the Seventh Circuit, filed July 15, 1940, appears at pages 99 to 112 of the record and is reported in 114 F. 2d 131 (advance sheets).

No opinion of the Circuit Court of Appeals was filed in denying petitioner's petition for a rehearing.

II

JURISDICTION

A statement particularly disclosing the basis upon which it is contended that this court has jurisdiction is set out in the petition for the Writ of Certiorari at page 4, and for brevity is not repeated here.

III

STATEMENT OF THE CASE

A full statement of the case having been given in the petition for certiorari for brevity is not here repeated.

IV

ASSIGNMENTS OF ERROR

The Circuit Court of Appeals erred in each of the following particulars:

1. In holding that the full cash value of the policy, in the amount of $1,577.60, was not available for computing the extended insurance benefit to which the insured was entitled at the time the policy lapsed for non-payment of premium; and that the insurance contract contemplates the appropriation for extended insurance purposes of only so much of the reserve value of the policy as remain after deducting the insured's indebtedness to the insurer.

2. In holding that the loan clauses of the policy provide that cash loans and premium loans made by the company, to the insured, reduced the reserve values pro rata.

3. In holding that the sum which the insured would have received if he had elected to surrender the policy for its cash value, and no more, was the only sum available for

the exercise of the extended insurance option under the policy.

4. In holding that when the policy lapsed into extended insurance on September 29, 1931, the indebtedness chargeable against the policy was deductible both from the face of the policy and from the available reserve value.

5. In construing the policy in the light of what the court declares to be sound and consistent with settled insurance practices; and in thus charging the insured with knowledge of what was consistent with sound and settled insurance practices, and that the insured had contracted with respect thereto, of which there is no evidence in the record.

6. In holding that the insured cannot use up the policy reserve, in the form of loans, and yet have the full cash reserve applied in computation of extended insurance.

7. In holding that there is nothing in the Indiana statute which would make available for extended insurance computation the gross or unreduced cash reserve of the policy; and that the Indiana statute, as does the policy, contemplates that a net reserve value will be applied in the computation of extended insurance.

8. In holding that the Indiana Supreme Court, in the case of Metropolitan Life Ins. Co. v. Winiger, 215 Ind. 120, 17 N. E. (2d) 86, found that the policy involved in that case provided for deducting the indebtedness from the reserve value and also from the amount of extended insurance, and that such provision indicated that the company has chosen the first option permitted by the Indiana statute, viz: to reduce the amount, and not the term, of extended insurance.

9. In holding that in the Winiger case the insurance company arrived at the amount of extended insurance by

applying the net reserve value (the reserve value less the indebtedness chargeable against the policy) and finding out how much term insurance that sum would purchase; and that the Indiana Supreme Court approved of such method of settlement as being in accord with the requirements of the Indiana statute.

10. In holding that under the terms of the policy in the instant case, and the Indiana statute, the insurance company may compute the extended insurance by finding what the reserve value less the total indebtedness chargeable against the policy will purchase.

11. In its construction of the opinion of the Indiana Supreme Court in the case of Metropolitan Life Ins. Co. v. Winiger, 215 Ind. 120, 17 N. E. (2d) 86, and the opinion of the Indiana Appellate Court in the case of Reserve Loan Life Insurance Co. v. Brammer, 83 Ind. App. 584, 146 N. E. 876; and in its application of said Indiana decisions to the facts in this case.

12. In refusing to follow the rule announced by this court in Erie Railroad Company v. Tompkins, 304 U. S. 64 in that the Circuit Court of Appeals refused to follow the controlling Indiana decisions on (a) the right of the insurer to deduct the indebtedness of the insured, secured by the policy, from both the cash reserve and, also, from the amount of the insurance, in computing the extended insurance benefit under an Indiana insurance contract, (b) that the insured's indebtedness to the insurer does not affect the insured's right to have the full cash surrender value of the policy applied as a net single premium in computing the extended insurance benefit under an Indiana insurance policy, (c) holding that the table of values set out in the policy is the sole and only measure of extended insurance benefit under an Indiana insurance contract, and

(d) that the ambiguity arising from inconsistent, conflicting and contradictory provisions of the policy must be construed, and that the doubt as to the intention of the parties arising from the language of the policy must be resolved, in favor of the insured and so as to effectuate indemnification to the insured or his dependent beneficiary against loss, rather than to defeat it.

13. In refusing to follow the rule announced by this court in Ruhlin v. New York Life Ins. Co., 304 U. S. 202 in that the Circuit Court of Appeals failed to apply the entire body of the substantive law of Indiana governing an identical action in the state courts.

14. In having read into the policy the Indiana statutory rule for computing the amount of extended insurance "in the ratio of such indebtedness to the net value of such extended insurance" and in having thus deprived the insured (and respondent as his beneficiary) of the benefit of the more favorable rule set out in the policy for computing the amount of extended insurance.

15. In having failed to find that petitioner was entitled to judgment on her counterclaim for $8,427.70 (being the face amount of the policy less the policy loan indebtedness and interest thereon to the date of lapse) together with dividend of $95.50 standing to the credit of the policy when it lapsed on September 29, 1931, and dividends thereafter apportioned to such extended insurance (R. 43), with interest on said amounts from the time when the same should have been paid.

16. In having failed to reverse the District Court and remand the cause with direction to the District Court to restate its conclusions of law in favor of petitioner on her counterclaim, and against the respondent on its complaint for declaratory judgment.

V

ARGUMENT

A. Complete jurisdiction in the Supreme Court of the United States is shown by the record since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. Petitioner was a party to such case. Judicial Code Section 240 (a), amended February 13, 1925. C. 229, 43 Stat. 938, 28 U. S. C. A. 347.

B. (1) The Circuit Court of Appeals held that under the first option granted by Subsec. 10, Sec. 5, of the Indiana statute (Acts of 1909) the insured was entitled to less than $100 extended insurance for the term stated in the table of values, to wit: 11 years, 178 days. (R. 110, 111); and that under the terms of the policy and the Indiana statute the company could compute the extended insurance by finding out what the reserve value (cash value) of the policy less the total indebtedness chargeable against the policy will purchase. (R. 111.)

Thus the Circuit Court of Appeals not only allows the company a double deduction of the indebtedness, but allows the company to deduct more than $9,900 from the amount of insurance and to deduct, also, the full indebtedness from the cash value of the policy in determining the net single premium available for the purchase of extended insurance.

The policy sued on in the case of Waddell v. New England Mutual Life Ins. Co. of Boston, Mass., 83 Ind. App. 209, contained substantially the same provisions as does the policy sued on in this cause. In the Waddell case the insurer, when the policy lapsed, deducted the indebtedness from the cash value of the policy in computing the net

single premium available for the purchase of extended insurance, and again deducted the indebtedness from the amount of extended insurance. Of such computation of the extended insurance benefit under the policy the Indiana Appellate Court, at page 214, of the opinion, said:

> "But it must be observed that the provision is in the alternative. The indebtedness shall reduce the amount or term of the extended insurance."

And in the same case the court construed the identical provisions of the policy here in suit and held that the insured was entitled to extended insurance for the face amount of the policy less the indebtedness thereon, saying:

> "An examination of the provisions of the policy as to extended insurance, above set out, discloses that the insured was entitled to extended insurance for the face amount of the policy, including any additions, and *'less any indebtedness hereon or secured hereby.'* (Our italics.) There is, then, an express provision for the reduction of the face amount of the policy by the amount of the indebtedness, and there is no provision whatever for deducting the existing indebtedness from the cash value in computing the term. It is significant that the first and second options provide for deducting from the cash value of the policy any indebtedness while the third option the one here involved does not so provide. Indeed, it should not so provide, for in that event appellee would be receiving, as by its method of adjustment it did receive, a double credit for the indebtedness—one from the face amount of the policy, in determining the amount of extended insurance, and the other from the cash value in determining the term of extension. This would manifestly be unfair."

The holding in the Waddell case was followed by the Indiana Appellate Court in the case of Metropolitan Life

Ins. Co. v. Winiger, 12 N. E. 2d 1008. The Indiana Supreme Court, in the case of Metropolitan Life Ins. Co. v. Winiger, 215 Ind. 120, affirmed the holding of the Appellate Court in the Waddell case to the effect that the Indiana statute was in the alternative—that the indebtedness secured by the policy may be applied to a reduction of the amount or term (not both) of the extended insurance in the following language found at page 127 of the opinion:

> "By the plain and express terms of the above statute the legislature granted two options: (1) The indebtedness shall reduce the amount of the extended insurance in the ratio of such indebtedness to the net value of such extended insurance, or (2) such indebtedness shall reduce the term of such extended insurance. * * * The statute permits the indebtedness to be used in either of the above methods. * * * The statute does not designate which of the two options shall be incorporated in the policy. The insurance company is permitted to designate either. In the policy here in question, the company chose the first option, that is, to use the indebtedness to reduce the amount of extended insurance and not the term. Appellee's insured accepted this method of settlement when he purchased the insurance as the policy became the contract between the parties."

Thus the Indiana courts have construed the meaning and obligation of a policy containing substantially the same provisions as the one in controversy here and the Circuit Court of Appeals should have followed the decision of the Indiana Appellate Court in the case of Waddell v. New England Mutual Life Ins. Co., 83 Ind. App. 209.

In the case of Mutual Life Ins. Co. v. Johnson, 293 U. S. 335, 339, 340, this court held:

> "As to the meaning and obligation of such a policy the highest court of the state has spoken * * *

> construing a provision substantially the same as the one in controversy here * * *. In this situation we are not under a duty to make a choice for ourselves between alternative constructions as if the courts of the place of the contract were silent or uncertain. Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. The case will not be complicated by a consideration of our power to pursue some other course."

The Circuit Court of Appeals refused to follow the law of Indiana as established by the above decisions, to wit: that an insurer can not make a double deduction of the indebtedness secured by the policy; and attempts to evade this well settled rule of law in Indiana by holding that the insurer may profit to an even greater extent than a double deduction of the indebtedness, if made from the amount, only, rather than from the amount and the term, of extended insurance.

(2) It is a settled doctrine of the law of insurance that where the terms of an insurance policy are more favorable to the insured than the applicable statute requires the insurer is bound by the more favorable terms of its contract. Gooch v. Metropolitan Life Ins. Co., 333 Mo. 191, 61 S. W. 2d 705, 706; Heuring v. Central States Life Ins. Co., 232 Mo. 731, 120 S. W. 2d 176, 183; New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 411; Prudential Ins. Co. v. Ragan, 184 Ky. 359, 212 S. W. 123, 125, 126 (Cert. Den. 250 U. S. 668).

And this rule obtains in Indiana. Waddell v. New England Mutual Life Ins. Co. of Boston, Mass., 83 Ind. App. 209, 213; Metropolitan Life Ins. Co. v. Winiger, 12 N. E. 2d 1008.

The Circuit Court of Appeals has impliedly held that the insured, under the terms of the policy, was entitled to extended insurance reduced by the indebtedness, in the ratio that the indebtedness bore to the cash value of the policy at date of default; and has thus read into the policy the first option permitted by Subsec. 10, Sec. 5, of the Indiana statute for computing the amount of extended insurance, which is less favorable to the insured than the rule set out in the policy for computing the extended insurance benefit. The policy provides that if default in premium payments should occur after payment of three annual premiums the policy will be extended as term insurance "for its face amount * * * less any indebtedness" (R. 53)—a simple deduction or subtraction. If the policy provision for computing the amount of extended insurance prevails the insured was entitled to $8,427.70 extended insurance. If the statutory ratio method of computing the extended insurance prevails, as impliedly held by the Circuit Court of Appeals, the insured was entitled to less than $100 extended insurance. Thus the Circuit Court of Appeals has failed to follow the law that where the policy contains provisions more favorable to the insured than required by the statute the insurer is bound by the policy provisions.

(3) The Circuit Court of Appeals held that there was nothing in the Indiana statute which would make the gross cash reserve value of an Indiana insurance policy available for computation of extended insurance. (R. 110) In so holding the Circuit Court of Appeals has erred in its construction of the Indiana statute, and has failed to follow the decisions of the Indiana Courts in Equitable Life Ins. Co. of Iowa v. Taylor, et al. (1939), 106 Ind. App. 508; Equitable Life Ins. Co. of Iowa v. Horner, et al.

(1933), 97 Ind. App. 347; and Metropolitan Life Ins. Co. v. Winiger, 12 N. E. (2d) 1008.

Sec. 5 of the statute, Ch. 95, Acts of 1909, provides that no policy of life insurance shall be issued or delivered in Indiana after said act becomes effective unless the same shall contain:

> "(7) A table showing in figures the loan values and the cash, paid-up and extended insurance options upon surrender, or available under the policy each year, upon default in premium payment, * * * *which values shall be equal to the full reserve on the policy* * * *." (10) That in the event of the default of premium payment after premiums have been paid for not less than three years, *the insured shall be entitled to the extended insurance shown in the table of values* and options for the end of the last year for which full annual premiums shall have been paid * * *." (Our italics.)

Thus the statute clearly makes the table of values set out in the policy the sole and only measure of the extended insurance benefit under an Indiana life insurance contract, and such value "shall be equal to the full (cash) reserve on the policy." The amount of insurance and the term of the extension, taken together, make up the extended insurance value. The amount and the term, taken together, is an inseperable quantity—the extended insurance value. To take any sum from the amount, or any time from term, depreciates this value. But this extended insurance value may be reduced in amount, or in the term, "in the ratio of such indebtedness to the net value of such extended insurance." However, as heretofore pointed out, if the policy provides for reducing the amount or term of such extended insurance by a rule of computation more favorable to the insured than the ratio method of computation, the company

is bound by the rule set out in the policy for computing said value.

The Indiana courts have held that the table of values set out in the policy is the sole and only measure of extended insurance benefit under an Indiana life insurance policy.

In the case of Equitable Life Ins. Co. of Iowa v. Horner, et al., 97 Ind. App. 347, 351, 352, the court said:

> "Thus we hold that the legislature intended that the insured should be entitled to something. The next inquiry is, What is he entitled to: * * * the appellant says that he is entitled to an option—the appellees say he is entitled to extended insurance. The appellant says he is entitled to something, if he wants it—the appellees that he has something whether he wants it or not. * * * The appellant says the insured is entitled to it after he has complied with conditions prescribed by them. This last does not seem logical * * *. Thus it seems clear that the legislature intended and we here hold that 'entitled' as here used means, have an absolute right to the amount of extended insurance set out in the tables * * *. *It was not intended that the insured could have this or could have something else.* The statutes recognize that, after premiums had been paid for a certain period, there was an equity established in favor of the insured. Thus they provided that the insured should have extended insurance for that equity." (Our italics.)

Furthermore, Subsec. 9, Sec. 5 requires an insurer, after payment of three full year's premiums on an Indiana life insurance policy, while the policy is in force, to loan on a proper assignment of the policy, and on the sole security thereof, at a specified rate of interest, a sum equal to, or at the option of the insured, less than the amount stated in

the table of values to be loaned at the end of the current policy year, and that no condition other than an assignment of the policy and interest at a specified rate shall be exacted of the insured as a prerequisite to any such loan.

Thus it seems clear that the Legislature of Indiana, in the enactment of the statute, intended to protect policyholders against the forfeiture of any benefit under the policy, or at least any benefit required by the statute. The effect of the decision of the Circuit Court of Appeals is to penalize the insured for having borrowed on the policy. The extent of such penalty, according to the opinion of the Circuit Court of Appeals, is that the insured forfeited approximately 99% of the extended insurance benefit provided for in the policy.

If the insured had borrowed from respondent, on the security of his real estate, the same amount of money that he borrowed on the security of his policy, respondent could have exacted of the insured no more than its loan and legal interest. Having availed himself of his contractual and statutory right to borrow on the security of the policy respondent, according to the opinion of the Circuit Court of Appeals, may exact of the insured not only its loan of $1,520.00 and legal interest, but a forfeiture of more than $9,900 of his extended insurance.

(4) The Circuit Court of Appeals has held, in effect, than an insurer may discriminate, as to non-forfeiture benefits, between borrowing and non-borrowing policy holders. If the insured had not availed himself of the benefit provided for in the policy, and required by the statute, to borrow on the security of the policy, he unquestionably would have been entitled, when the policy lapsed, to extended insurance in the sum of $10,000 for 11 years, 178 days. Having availed himself of the benefit of the policy, and the

statute, to borrow $1,520.00 from the company, on the security of the policy, the Circuit Court of Appeals has held that the insured forfeited, thereby, approximately 99% of the extended insurance benefit of the policy. The holding of the Circuit Court of Appeals, in this respect, is contrary to the decision of the Indiana Appellate Court in the case of Metropolitan Life Ins. Co. v. Winiger, 12 N. E. (2d) 1008. The Indiana Supreme Court, on transfer of this case from the Appellate Court, decided the case on a different theory and reversed the Appellate Court, but did not reverse the holding of the Appellate Court to the effect that such discrimination between borrowing and non-borrowing policy-holders was unlawful and against public policy. The opinion of the Indiana Appellate Court in the Winiger case is the only law in Indiana on the subject of unlawful discrimination between policy holders of the same class.

(5) The Circuit Court of Appeals held that the full cash surrender value of the policy was not available for computation of extended insurance, by reason of the fact that the insured was indebted to respondent at the time the policy lapsed, and that there was nothing in the policy, or the Indiana statute, which would make the full cash value of the policy available for computation of extended insurance (R. 109, 110); and that the reserve value of a life insurance policy was for the benefit of the insured—that the insured may borrow it, he might cause the policy to lapse and have the reserve value applied to the purchase of extended term or paid-up insurance, or surrender the policy and claim its reserve in the form of a cash surrender value, "but he can not use it up and have it too." (R. 110.)

If borrowing the full cash surrender value of the policy amounts to using it up and having it too an insured, under

an Indiana insurance contract, can do just that according to the holding of the Indiana Appellate Court in the case of Equitable Life Ins. Co. of Iowa v. Taylor, 106 Ind. App. 508, where the court said, at page 513 of the opinion:

> "Appellant contends that the insured could not 'withdraw from the policy its entire value and yet have the policy continued for its face value as extended insurance.' Said proposition is tenable when the 'withdrawal' is a surrender of the policy for its cash value (see Pacific States Life Ins. Co. v. Bryce, 10 Cir., 67 F. 2d 710, 91 A. L. R. 1446; Lipman v. Equitable Life Assur. Soc. of U. S., 4 Cir., 1932, 58 F. 2d 15), but it is not tenable as applied to a loan of the full amount of cash value in the absence of statutory provisions, or provisions in an insurance policy to that effect. Appellant does not cite such provisions as being applicable here and we have found none. The making of such a loan, in the absence of such provisions, is a new transaction which is independent of the insurance contract, except that the equity of the insured under the policy is held by the insurer as collateral security for the payment of the loan."

There is no provision in the Indiana statute, nor in the policy here in suit, even suggesting that a loan of the full cash surrender value of the policy affects the insured's right to extended insurance.

And we think that the Appellate Court of Indiana properly construed the statute in its decision in the Taylor case because Subsec. 9, Sec. 5, of the statute (Ch. 95, Acts 1909) provides that policies must contain provisions for loans, and prescribe the conditions under which such loans shall be made, and then stipulates that such provisions for such loans "shall not be required in term policies nor shall it apply to paid-up insurance issued or granted in exchange for lapsed or surrendered policies." The policy here in

suit is not a term policy or a paid-up policy issued or granted in exchange for a lapsed or surrendered policy and, therefore, under the provisions of the statute, the insured was entitled to a loan of the full cash surrender or loan value of the policy even after it lapsed into extended insurance. This being true, it certainly can not be held that a loan of the full policy reserve, before the policy lapsed, would affect the insured's right to the extended insurance benefit, or amount to using up the policy reserve and having it too. The decision of the Circuit Court of Appeals is expressly contrary to both the statute of Indiana and the decision of the Indiana Appellate Court in the case of Equitable Life Ins. Co. of Iowa v. Taylor, et al., 106 Ind. App. 508.

(6) The Circuit Court of Appeals held that the loan clauses of the policy provide for reducing the reserve values pro rata (R. 109). The Circuit Court of Appeals clearly erred in this statement as no such language appears anywhere within the policy provisions.

The Circuit Court of Appeals held that if the insured had elected to surrender the policy for its cash value he would have received an amount equal to the cash reserve less the indebtedness, and that consequently the net or reduced reserve, and no more, was the sum available for the exercise of the other options under the policy (R. 109.)

The first option of the non-forfeiture provisions of the policy clearly provides that if the insured should elect to surrender the policy for its cash value he would be entitled to receive the cash reserve less any indebtedness (R. 52, 53).

The second option clearly provides that if the insured should elect to take paid-up insurance the indebtedness should be deducted from *"the then cash value"* in ascer-

taining the net single premium available for the purchase of such paid-up insurance (R. 53).

But the third option, the one here involved, provides that if the insured should elect to take extended insurance he is entitled "to have the policy extended for its face amount * * * less any indebtedness * * *, for such time as *the then cash value* * * *, will purchase as a net single premium" (R. 53).

The policy nowhere provides that the indebtedness shall reduce the amount of extended insurance in the ratio or proportion that the indebtedness bears to the cash value of the policy at date of lapse, or that the indebtedness should be deducted from the cash value in ascertaining the net single premium.

The Circuit Court of Appeals clearly erred, therefore, in holding that the net or reduced cash reserve, and no more, was the sum available for the exercise of the extended insurance option under the policy. Waddell v. New England Mutual Life Ins. Co., 83 Ind. App. 209, 214.

The contract is perfectly clear—the insured was entitled, when the policy lapsed, to extended insurance for the face of the policy less (a simple subtraction of) the indebtedness, unless the word "proportionately" used in the clause of the policy entitled "Table of Loan, Cash, Paid-up and Extended Insurance Values" (R. 53) is to be construed in the sense of in the ratio, or in the proportion, that the indebtedness bore to the cash value of the policy at date of default. To so construe the word "proportionately," appearing in said clause, as the Circuit Court of Appeals apparently did, is to resolve the doubt arising from the language of the policy in favor of the insurer, rather than in favor of the insured. And furthermore to place such a construction on said clause of the policy is to make it in

conflict with, and contradictory of, the provisions of the policy, and the table of values, which provide that the insured is entitled to extended insurance for the face of the policy less any indebtedness thereon for 11 years, 178 days, if default should occur after payment of nine annual premiums.

> "The established rule is that an insurance policy prepared by the insurer, the form of which the insured cannot control nor alter, which may not even be seen by the insured until it is delivered to him in final consummation of the contract of insurance, shall not receive a strained construction as against the insured, but that doubts as to its construction arising from contradictory provisions or ambiguous expressions which it may contain are to be resolved against the company that issued it. * * *
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> The insertion of language in one part of the policy favorable to the insurer, in apparent conflict with language favorable to the insured used in another part, only creates an ambiguity calling for application of the rule that when the meaning is doubtful the contract must be given that construction which is most favorable to the insured." Pacific Mutual Life Ins. Co. v. Alsop, 191 Ind. 638, 641.
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> "If the policy contains inconsistent provisions or terms requiring construction, that interpretation should be adopted, if possible, which will sustain, rather than forfeit, the contract." American Income Ins. Co. v. Kindlesparker, 102 Ind. App. 445, 453.
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> "An insurance policy should be so construed as to effectuate indemnification to the insured or his dependent beneficiary against loss, rather than to defeat it." Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 482.

The language of the policy which refers to the values set out in the table of values, to wit: "They will be increased

by the value of any additions or accumulations at interest and decreased proportionately by any indebtedness hereon," refers to all of the values in said table. The word "proportionately," as used in said clause of the policy, (R. 53) is obviously used in the sense of "respectively." Each of the values set out in the table shall be increased by any additions, and decreased by any indebtedness.

The extended insurance is to be increased by any additions. Increased how? The answer is found in the extended insurance clause of the policy "To have the Policy continued as extended insurance * * * for its face amount, including any additions." The extended insurance is to be decreased proportionately by any indebtedness on the policy. Decreased how? Again the answer is found in the extended insurance clause of the policy—"To have the Policy continued as extended insurance * * * for its face amount, * * * less any indebtedness hereon."

> "Contracts of insurance should not be construed through the magnifying eye of a technical lawyer, but rather from the standpoint of what an ordinary man would believe the contract to mean." Murphy v. New York Life Ins. Co., 219 Iowa 609, 258 N. W. 749, 751.

And if there is a conflict between the printed provisions of the policy and the table of values set out therein, the table of values control.

> *Atlantic Life Ins. Co. v. Pharr*, (C. C. A. 6th) 59 F. (2d) 1024, 1025;
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> *Moss v. Aetna Life Ins. Co.*, (C. C. A. 6th) 73 F. 339, 342;
>
> *Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 545.

And equivocal expressions in an insurance contract whereby the insurer seeks to narrow the range of its liabil-

ity, or renounce the liability purported to be assumed by the general language of the contract, are to be construed most strongly against the insurer.

Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 481;
Hessler v. Federal Casualty Co., 190 Ind. 68, 75;
Maxwell v. Springfield F & M Ins. Co., 73 Ind. App. 251, 255.

The face of the policy (insuring clause) provides that in consideration of the application and the payment of the annual premium of $317, the insurance company "Promises and Agrees to Pay * * * upon due proof of death of said insured, Ten Thousand Dollars, * * * less any indebtedness to the company on this Policy," (R. 49), and the extended insurance clause provides that the policy will be extended "for its face amount, * * * less any indebtedness."

It seems, therefore, that the opinion of the Circuit Court of Appeals rests solely upon its construction of the word "proportionately" found in the clause of the policy entitled Table of Loan, Cash, Paid-up, and Extended Insurance Values, which word is obscure both in its position and in its meaning.

Clearly the Circuit Court of Appeals has resolved the doubt arising from the language of the policy in favor of the insurance company, rather than in favor of the insured, contrary to the decisions of the Indiana Courts heretofore quoted and cited.

(7) Certainly it can not be said that the language of the policy sued on in this cause of action is not susceptible to two constructions, equally reasonable, or that reasonably intelligent men, on reading the policy, would not honestly differ as to the meaning of the language of the contract. In this case counsel for petitioner, counsel for respondent,

the learned trial judge, and the learned judges of the Circuit Court of Appeals, all honestly differ as to the meaning and effect of the language of this insurance contract.

It is well settled in Indiana that where insurance contracts are so drawn that reasonably intelligent men, on reading the same, would honestly differ as to their meaning, courts will adopt that construction most favorable to the insured, and such as will support a claim under the policy.

> "In such a situation where two interpretations equally fair may be made from the provisions of the policy that interpretation supporting indemnity will be adopted," Richmond Ins. Co. of N. Y. v. Boetticher, et al., 105 Ind. App. 558, 562.

> "One of the rules, applicable to insurance contracts, is that, where such contracts are so drawn as to be ambiguous, or to require interpretation, or are fairly susceptible to two different constructions, so that reasonably intelligent men, on reading the same, would honestly differ as to their meaning, court will adopt that construction most favorable to the insured." Fidelity & Casualty Co. of N. Y. v. Blount Plow Works, 78 Ind. App. 529, 533.

In refusing to follow the above cited and quoted decisions of the Indiana Courts, the Circuit Court of Appeals violated the rule established by this court in the case of Erie Railroad v. Tompkins, 304 U. S. 64, 66.

C. The Circuit Court of Appeals apparently gave little or no consideration to the cases of Waddell v. New England Mutual Life Ins. Co. of Boston, Mass., 83 Ind. App. 209, 214, and Equitable Life Ins. Co. of Iowa v. Taylor, et al., 106 Ind. App. 508, 513, which are applicable decisions of the Indiana Courts. The policy in suit in the Waddell case was issued by (the same insurance company) respondent

and contained substantially the same provisions as the policy in controversy here, and the decision of the Indiana Appellate Court in that case is a part of the substantive law of Indiana governing an identical action in the state courts. In the Taylor case the Indiana Appellate Court decided one of the principal questions involved in this case, viz., does a loan to the insured of the full (or most all of the) cash surrender or loan value of the policy constitute a withdrawal (or using up) of the policy reserve so that there is no cash reserve with which to purchase extended insurance. The holding of the Circuit Court of Appeals that the insured can not use up the policy reserve, in the way of loans and "have it too" (R. 110), in the way of a net single premium applicable to computation of the extended insurance benefit under the policy, is diametrically opposed to the decision of the Indiana Appellate Court in the Taylor case, which decision, like the Waddell decision, is a part of the substantive law of Indiana.

The Circuit Court of Appeals not only erred in refusing to follow the decisions of the Indiana Courts in the Waddell and Taylor cases, governing the identical questions here involved, but it further erred in its construction and application of the decisions of the Indiana Courts in the cases of Reserve Loan Life Ins. Co. v. Brammer, 83 Ind. App. 584, 146 N. E. 876, and Metropolitan Life Ins. Co. v. Winiger, 215 Ind. 120, 17 N. E. (2d) 86.

No question of extended insurance rights were involved in the Brammer case as the policy sued on in that case was a fully paid twenty payment life policy and was avoided for the reason that the indebtedness exceeded its cash value, after notice required by the policy and the statute was given the insured, and two years after payment of the final premium. If it could be said that the Brammer

case ever was an Indiana decision tending to support the opinion of the Circuit Court of Appeals, it clearly was overruled by the later decision of the Indiana Appellate Court in the case of Equitable Life Ins. Co. of Iowa v. Taylor, et al., 106 Ind. App. 508.

The Circuit Court of Appeals grossly misconstrued the opinion of the Indiana Supreme Court in the case of Metropolitan Life Ins. Co., v. Winiger, 215 Ind. 120, 125. The court, in that case, simply held that the policy, in the substantial language of the statute, provided for reducing the amount of extended insurance in the ratio that the indebtedness bore to the cash value of the policy at date of default, and held the parties bound by the terms of the policy.

In refusing to follow the applicable Indiana decisions determining the identical questions involved in this case, and governing an identical action in the state courts, the Circuit Court of Appeals has violated the rule established by this court in the case of Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 208, 209, wherein this court held that:

> "Application of the 'State Law' to the present case, or any other case controlled by Erie R. Co. v. Tompkins, does not present the disputants with duties difficult or strange. The parties and the Federal Courts must now *search for and apply the entire body of substantive law governing an identical action in the state courts.*" (Our italics.)

D. As heretofore pointed out, the Circuit Court of Appeals construed the ambiguity arrising from the inconsistent, conflicting and contradictory provisions of the policy, and resolved the doubt arising from the language of the policy, in favor of the insurance company, rather than the insured, and in this respect the decision of the

Seventh Circuit Court of Appeals, in this cause, conflicts with the decisions of other Circuit Courts of Appeals in the following cases.

Pac. Mutual Life Ins. Co. of Cal. v. Goss, (C. C. A. 5th) 99 F. (2d) 658, 659;

Prudential Ins. Co. of America v. King, (C. C. A. 8th) 101 F. (2d) 990, 991;

Ashenbruner v. U. S. Fidelity & Guaranty Co., (C. C. A. 9th) 65 F. (2d) 976.

E. The decision of the Circuit Court of Appeals, in the case at bar, conflicts with applicable decisions of this court on the matter of the construction of ambiguous provisions, or doubtful language, of an insurance contract. In the case of Moulor v. American Life Ins. Co., 111 U. S. 335, 342, 343, this court said:

> "The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all of the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured."

F. The Seventh Circuit Court of Appeals held that the insured, by reason of his indebtedness to respondent at the time the policy lapsed, was entitled to less than $100 extended insurance for a term of 11 years, 178 days (R. 110, 111). Another policy-holder of the same class (ordinary life policy), of the same age as the insured under this policy, and for the same amount of insurance, not indebted to the company when the policy lapsed, would have been entitled to $10,000 extended insurance for a term of 11 years, 178 days. Thus, the Circuit Court of Appeals held, in effect, that the insurer can discriminate, as to nonforfeiture benefits, between borrowing and non-

borrowing policy-holders; and its decision in this respect, conflicts with the decision of the Eighth Circuit Court of Appeals in the case of Great Southern Life Ins. Co. v. Jones (1929) 35 Fed. (2d) 122, in which case the insured during his lifetime had borrowed and withdrew the whole of the reserve and cash surrender value, and at the time of default in premium payment his indebtedness to the company equaled the reserve and cash surrender value of the policy, and in which case there was a judgment for plaintiff for the face of the policy less the indebtedness at the time of default. The policy contained a provision that "should insured fail to pay any premium hereon, after one full annual premium has been paid, this policy without any action on the part of the insured will be extended for the sum first named herein, for the period of time designated in column four of the Table of Guaranteed Values, * * * if the policy be free from indebtedness at the time of default, * * *." The insurance company, in that case contended that since there was an indebtedness on the policy the insured was not entitled to the extended insurance benefit set out in the policy. In affirming the judgment the court said at page 126 of the opinion:

> "*Such a provision attempting to limit the automatic extension provision to policies on which there is no indebtedness is contrary,* both *to* the statutes of Oklahoma and *the great weight of authority.* In Metropolitan Life Ins. Co. v. Lillard, supra, the Supreme Court of Oklahoma held *that no discrimination in the benefits accruing to a policy-holder could be made merely because the insured had borrowed upon his policy; that it amounted to discrimination against one of a class of insured, and was therefore against public policy* and contrary to the provisions of section 6721, Comp. St. Okl. 1921, forbidding any distinctions or discriminations in favor of insurants of the same class and equal expectancy of life in respect to the amount

of premiums and rates charged, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract." (Our italics.)

G. It is well settled that an insurance company can not deny liability on a policy of insurance on one ground, and thereafter defend an action on the policy on a different ground, as all other defenses are deemed waived. Equitable Life Assur. Soc. of U. S. v. Winning, 58 F. 541, 546, 547; Queens Ins. Co. of America v. Strawboard Co. (1920), 76 Ind. App. 47, 51; Provident Life & Accident Ins. Co. v. Fodder, et al. (1934), 99 Ind. App. 556, 560.

> "And where an insurer, after loss, relies upon a specified defense alone, and so notifies the insured, he will not be permitted to retract it, and set up a new and different defense, after insured has acted upon the defense announced, and incurred expense in consequence of it." Couch on Insurance (1913 Edition) Vol. 8, Sec. 2168, P. 7018.

(1) In this case respondent denied liability on the policy for the reason that $143.70 was paid on account of the 1931 premium, which carried the policy in force until March 8, 1932, when it expired without value, and because, under the computations made and the action taken by respondent on October 30, 1931 (R. 42), the indebtedness equaled the cash value of the policy on March 8, 1932, and that all liability of the company had terminated on said date. (R. 43—Exhibit J-4, R. 67, 68—Exhibit K—R. 68.) Respondent's amended complaint for declaratory judgment, and its answer to petitioner's counterclaim, both proceed upon the theory that its announced reasons for denying liability on the policy entitled it to declaratory judgment under its amended complaint, and was a bar to petitioner's action under the counterclaim.

Respondent did not, and under the well settled law, could not, interpose as a defense to an action on the policy, that it was liable for less than $100 extended insurance; as all defenses other than announced in its letter (Exhibit K—R. 68) were waived.

The decision of the Circuit Court of Appeals, therefore, in effect, gives respondent the advantage of a defense not asserted by it, and not available to it, under the well settled law; and grants the respondent relief not prayed for in its amended complaint for declaratory judgment.

(2) The Circuit Court of Appeals held that the application of a net reserve (the cash value of the policy less the indebtedness thereon) was sound and consistent with settled insurance practices (R. 110.)

The Circuit Court of Appeals erred in construing the policy in the light of what was sound and "consistent with settled insurance practices"; and in thus charging the insured with a knowledge of what was sound and consistent with settled insurance practices, of which there is no evidence in this record.

In giving respondent the advantage of a defense not made by it, or available to it, and in granting respondent relief not sought in its complaint, and in introducing sound and settled insurance practices (custom) to vary the stipulations of the written contract, and charging the insured with knowledge of, and an intention to contract with respect to, what sound and settled insurance practices were, of which there is no evidence in the record, the Circuit Court of Appeals has so far departed from the usual and accepted course of judicial proceedings as to call for the exercise of this court's power of supervision.

H. Four important public questions are involved, viz: (1) Whether citizens of a state may, by judicial decree

which places a strained construction upon the laws of the state, be denied the protection of the laws of the state, and particularly valid statutes enacted out of considerations of public policy.

(2) Whether courts can impair the obligation of valid and binding contracts by such a strained construction thereof as to amount to writing into such contracts provisions not clearly agreed upon by the parties.

(3) Whether courts can lawfully vary the stipulations of valid contracts by introduction of equities, custom or practices.

(4) Whether courts can lawfully vary the stipulations of positive statutes enacted out of considerations of public policy, by the introduction of custom or practices.

The Circuit Court of Appeals has simply read into the policy here in question the Indiana statutory provision for computing the extended insurance benefit under the policy; and has varied the clear and unambiguous stipulations of the insurance contract by introducing what the court holds to be sound and settled insurance practices, contrary to the decisions of the Indiana Courts in the following cases, holding that custom (practices) can not vary the provisions of contracts.

Herz Straw Co., Inc. v. Capitol Paper Co. (1940), 24 N. E. (2d) 921, 922;

City Dairy Co. v. Uservo (1936), 101 Ind. App. 375, 382;

Cadick Milling Co. v. Valdosta Grocery Co. (1920), 72 Ind. App. 534, 546, 126 N. E. 240.

It is also well settled that custom, usage or practices cannot vary the stipulations of positive statutes.

Blizzard v. Walker, 32 Ind. 437, 438;

Bassey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452, 455.

In this case the entire record is before this court on this petition for the writ of certiorari, with power in this court to review the action of the Circuit Court of Appeals and direct such disposition of the case as that court might have made of it upon the appeal from the District Court; and since all material questions which might be raised on a consideration of the case upon its merits are raised on this petition for the writ of certiorari, it is suggested that this case is one in which this court might direct the disposition of the case upon its consideration and ruling on this petition for the writ of certiorari.

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555, 72 L. Ed. 545, 541;

Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267.

Wherefore, petitioner prays that the writ be granted.

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